Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PHILLIP W. KNIGHT,

Petitioner,

vs.

GEORGE MINGLEDORF,
COMMISSIONER OF REVENUE FOR
THE STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS OF ALABAMA

OF COUNSEL:

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QUESTION PRESENTED

Whether the Alabama Utility Gross Receipts Tax, §40–21–80 et seq., ***Ala.Code 1975***, as levied and imposed upon the furnishing of electric utility services by the City of Decatur, Alabama, and other similar distributions of electricity, pursuant to contracts with the Tennessee Valley Authority, is in violation of the provision of 16 U.S.C. §831l.

PARTIES TO THE PROCEEDING

All of the actual named parties appear in the caption of the case. This is was however brought as a class action seeking to establish a Plaintiff's class composed of all electric utility customers of the City of Decatur, Alabama, and other similar furnishers of electric utility services of the Tennessee Valley Authority.

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OFFICIAL AND UNOFFICIAL REPORTS

None of the opinions by the courts below in this case are reported opinions. Copies of said opinions or orders are included in the appendix hereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The trial court dismissed this cause by order dated June 18,1993 and filed of record on June 21, 1993. (See Appendix). A timely appeal was taken to the Alabama Court of Civil Appeals, which said court affirmed the trial court "order" without opinion on February 25, 1994. (See Appendix). The Plaintiff's application for rehearing was denied by the Court of Civil Appeals on March 25, 1994. (See Appendix) and a timely Petition for Certiorari was denied by the Supreme Court of Alabama on June 24, 1994. (See Appendix).

Jurisdiction of this Court to review the judgment in this case is conferred by 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 16 U.S.C. §831l.

2. Section 40-21-80, et.seq., ***Ala.Code 1975***.

STATEMENT OF THE CASE

The City of Decatur, Alabama, through its Utilities Board, distributes electricity to retail consumers in its geographical area (North-Central Alabama) under a distributorship agreement with the Tennessee Valley Authority, which is a federally chartered corporation under 16 U.S.C. 831, et.seq.

The Plaintiff, Phillip Knight, is a retail purchaser of electric utility services from the City of Decatur. Each billing period there has been added to the Plaintiff's bill for electric services a charge of four percent (4%) of the amount of the bill. This additional charge represents the amount of the Alabama Utility Gross Receipts Tax, §40-21-80, et. seq., ***Ala.Code 1975***, which is passed on by the City of Decatur to its customers.

The Plaintiff brought this action, as a purported class action on behalf of himself and all others similarly situated (i.e. retail consumers of TVA supplied electricity) alleging that the taxation of the activity of the City of Decatur, in furnishing electricity under contract with TVA violates the tax exemption established in 16 U.S.C. §831l. This "federal question" was first raised by the Plaintiff in his initial complaint (R.1) and was the theme of his case throughout these proceedings. The trial court disposed of this claim in its June 18, 1993 order at page 3 thereof (R. 368), in a summary fashion.

Alabama appellate procedure abolished the use of "assignments of error" and now the issues on appeal are framed by the Appellant's brief. The Plaintiff's brief on appeal to the Court of Civil Appeals

centered heavily on the federal question. At pages 7–9 of the Plaintiff's brief on appeal to the Alabama Court of Civil Appeals one can readily see that the federal question, i.e. the violation of 16 U.S.C. §831l, is clearly raised. (See Appendix).

ARGUMENT

This Court should grant the Writ of Certiorari in this case for two of the reasons outlined in Rule 10. First, the decision reached by the courts of Alabama in this case, while not falling precisely within the language of Rule 10.1(b), nevertheless fits the spirit of that rule. The decision in this case directly conflicts with a prior decision of the Alabama Supreme Court construing 16 U.S.C. §831l. See ***Town of North Courtland v. Town of Courtland***, 597 So.2d 1336 (Ala.1992). Secondly, the question here involved is an extremely important federal question, wrongly decided by the Alabama courts, which has not been, but should be, decided by this Court.

In the 1930's Congress created the Tennessee Valley Authority (TVA) as a federally chartered corporation whose primary function was navigation and flood control. As a permissible secondary purpose TVA also engaged in the generation and distribution of electricity. ***Tennessee Electric Power Co. v. TVA***, 21 F.Supp. 947 (D.C.Tenn. 1938), affirmed, 306 U.S. 118, 83 L.Ed. 543, 59 S.Ct. 366 (1939). One goal of TVA was to provide electric power services to rural areas in which commercial utility services were not economically feasible. It was intended that these services be provided at the lowest possible cost. In light of the

intergovernmental tax immunity doctrine, which had its origins in ***McCollough v. Maryland***, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), which would forbid state taxation of the activities of TVA, Congress created an "in lieu of taxation" provision embodied in 16 U.S.C. §831l, which amounts to a percentage of the gross revenues of TVA (now at 5%) generated by the sales of electricity in that state. As a consequence of these "in lieu of taxation" payments, Congress also clearly determined that there should be no tax incident to the distribution of TVA generated electricity. In the last sentence of the first paragraph of 16 U.S.C. §831l, Congress stated:

> . . . . The payments herein authorized are in lieu of taxation, and the corporation, its property, franchises and income, are hereby expressly exempted from taxation in any manner or form by any state, county, municipality, or any subdivision or district thereof.

This language leaves little doubt as to the intention of Congress. That intention was to exempt TVA activities, and the activities of those operating under a "franchise" from TVA, from any "manner or form" of taxation, i.e. directly, indirectly or otherwise.

The controversy here involved arose as a result of the passage by the Alabama legislature of the Utility Gross Receipts Tax in 1969. §40-21-80, et.seq., ***Ala.Code 1975***. This tax, denominated by §40-21-82, ***Ala.Code 1975***, as a "privilege or license" tax is levied against "every utility furnishing electricity, domestic water, or natural gas in the State of Alabama." Section 40-21-82, ***Ala.Code 1975***, further provides: "The

amount of the tax shall be determined by the application of rates against gross sales or gross receipts, as the case may be, from the furnishing of such services in the State of Alabama." (emphasis added).

In North Alabama there are some 18–20 electric cooperatives and municipalities which distribute electricity under contract with TVA. The City of Decatur, from which the Plaintiff purchases his residential electric service, is one of these. Since the passage of the Utility Gross Receipts Tax, the Alabama Department of Revenue, which administers the tax, has imposed the tax upon the City of Decatur and other distributors of TVA electricity. The tax scheme contains a "pass through" provision which allows the utility to pass the tax on to its customers, without a tax consequence, and hence the tax ultimately winds up on the Plaintiff's electric bill. While this "pass through" provision is there, nevertheless this tax is in fact a direct tax on the activity of TVA and its contractor in Alabama.

In the court below much of the argument centered around the question of whether the City of Decatur was a franchisee of TVA. That question quite frankly has been correctly decided by the Alabama Supreme Court in ***Town of North Courtland v. Town of Courtland***, 597 So.2d 1336 (Ala.1992). In that case, the town of North Courtland, Alabama, had adopted a utility gross receipts tax. At the same time the Town of Courtland, Alabama, through its Utilities Board was distributing electricity under contract with TVA. A portion of the distribution territory of Courtland extended into the police jurisdiction of North Courtland. As a consequence, North Courtland attempted to

impose its utility gross receipts tax on the distribution activities of the Town of Courtland. Relying on the decision of District Judge Acker in ***City of Sheffield v. Town of Cherokee***, No. 89-AR-5073-NW (N.D.Ala. Oct. 12, 1989) the Supreme Court of Alabama, per Hornsby. C.J., held that 16 U.S.C. §831l exempted the operations of the Town of Courtland from the tax. *See 597 So.2d at 1338.* The Federal Court decision is unpublished, but a copy of that decision appears at pages 318-327 of the record in this case and is reproduced in the appendix herein. The corner stone of the decisions in the ***North Courtland*** case, ***supra***, and in the ***Sheffield*** decision is the simple fact that the contractual relationship between TVA and its local distributors of electricity are the kind of "franchises" referred to in 16 U.S.C. §831l.

In fact, the Alabama legislature, in passing the Utility Gross Receipts Tax recognized that certain activities of "furnishing" utility services would be outside the taxing authority of the State. In §40-21-83, ***Ala.Code (1975)***, appears the following:

> §40-21-83. Exclusions.
>
> There are hereby specifically excluded from the gross receipts or gross sales of a utility, all revenues derived from the following:
>
> (1) The furnishing of utility services which the State of Alabama is prohibited from taxing under the Constitution or laws of the United States of America or the Constitution of Alabama.

Under Alabama law, then, if the activity of "furnishing" electricity (that is the selling of it if you will) cannot be lawfully taxed, then that "furnishing" is not part of the gross receipts upon which the tax is levied and measured. Again, the federal question, i.e. the tax exemption of 16 U.S.C. §831l, is at the heart of this inquiry. In simple terms, if federal law exempts the act of "furnishing" as opposed to purchasing of electricity, from taxation, then such transactions are not taxable regardless of who ultimately pays the tax. The trial court disposed of this argument by concluding that the exclusion in §40-21-83(1) applied only to sales of electricity to the federal government. That is clearly wrong. It is not the purchasing of the electricity that determines its taxability, it is the selling of it that does. "Furnishing" denotes the seller not the buyer.

As we said, the trial court in this cause reached its ultimate decision on the basis that the tax was, by virtue of §40-21-86, ***Ala.Code 1975***, denoted a consumer tax, and passed on by the utility to its customers. In other words the Utility Gross Receipts Tax is a "pass through" tax. However, as this Court recognized in ***Bacchus Imports, Ltd. v. Dias***, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), such "pass through" provisions do not cure constitutional defects of a state tax simply because the supplier of the product does not pay the tax. The only significance that this court attached to the "pass through" provision of the tax in ***Bacchus*** was on the questions of who could claim the refunds. The Court determined, 468 U.S. at 267, that the wholesalers could challenge the tax because it directly impacted upon their transactions and because they were liable to the state for the tax whether they collected it from their customers or not.

As in ***Bacchus***, the City of Decatur is directly impacted by the Alabama Utility Gross Receipts Tax. As in ***Bacchus***, the tax here directly increases the cost of the product to the consumer. And again, as in ***Bacchus***, the utility here is directly liable to the state of Alabama for this tax, whether they collect it from their customers or not. Section 40-21-86 provides in pertinent part:

> . . . . The provisions of this section that the tax herein levied shall be collected from the purchaser shall in no way relieve any utility of the tax herein levied; nor shall the inability, impracticability, refusal or failure so to collect from such purchaser the amounts provided herein relieve such utility of the tax herein levied. . . .

While the pertinent considerations are basically the same in this case as in ***Bacchus***, there are two significant differences. First, the complaining party here is the one who clearly paid the tax. Secondly, and more significantly, the tax in ***Bacchus*** simply added the 20% to the cost of the product thereby impacting the price. Here we have the highly discriminatory result which Congress was obviously attempting to avoid. Consider this, by virtue of 18 U.S.C. §831l, TVA is required to pay to the State of Alabama an "in lieu of taxation" amount equal to 5% of its gross proceeds from its distribution activities in Alabama. This 5% obviously is factored into the cost or price of the electricity as it moves to the ultimate consumer. This is a 5% added cost that private utility companies do not pay. In a sense, this is itself a gross receipts "tax". If it is held that Alabama can validly

impose its 4% Utility Gross Receipts Tax on the sale of TVA electricity by TVA franchises, then the customers of these franchisees have a total of 9% added to their ultimate cost, while customers of private utility companies have only 4% so added. This is exactly the result that Congress intended to avoid.

CONCLUSION

No matter how one may attempt to characterize the Alabama Gross Receipts Tax, it is a tax which is levied upon and calculated by the activity of "furnishing" electric utilities in the State of Alabama. Since the City of Decatur, and other such distributors of TVA electricity operate under "franchises" from TVA, such activity is clearly exempted from taxation by 16 U.S.C. §831l. Accordingly, the courts below erred and this court should grant the Writ. Upon further and full review this Court should reverse the decision in this case.

Respectfully Submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

PHILLIP W. KNIGHT,

PLAINTIFF,

VS. CASE NO. CV 92-288

JAMES M. SIZEMORE, JR.,
as Commissioner of Revenue for
the State of Alabama,

DEFENDANT.

COMPLAINT

1. The Plaintiff is over the age of nineteen years and is a bona fide resident citizen of Decatur, Morgan County, Alabama.

2. The Defendant is the Commissioner of Revenue for the State of Alabama and, in such capacity, is charged by law with collection of various taxes including those "gross receipts taxes" contemplated by §§40-21-80, et. seq. CODE OF ALABAMA, 1975.

3. The Plaintiff is currently purchasing and has, at all times relevant to this Complaint, purchased electricity for his residence from the Utilities Board of the City of Decatur, Alabama. The Utilities Board of the City of Decatur, Alabama purchases and, at all times material to this Complaint, has purchased wholesale electric power from the Tennessee Valley

Authority. The Tennessee Valley Authority is a corporate entity created pursuant to an act of the United States Congress, viz: 16 USC §§ 831, et. seq. Insofar as it purchases electricity at wholesale from the Tennessee Valley Authority, the Utilities Board of the City of Decatur, Alabama is a franchisee withing the meaning and contemplation of 16 USC §§ 831, et. seq.

4. At all times material to this Complaint, the Defendant has unlawfully assessed, collected and received "gross receipts taxes" with respect to the purchase of electricity by the Plaintiff as aforesaid under the erroneous contention that §§ 40-21-80, et.seq., CODE OF ALABAMA, 1975 lawfully applies, inter alia, to utilities who purchase electricity from the Tennessee Valley Authority.

5. The "gross receipts taxes" collected by the Defendant referable to electricity purchased by the Plaintiff as aforesaid were assessed, collected and received by the Defendant illegally and specifically in violation of 16 USC §831l.

6. The Plaintiff avers and alleges that he is entitled to a refund of taxes collected as aforesaid by the Defendant insofar as his purchase of electricity from the Utilities Board of the City of Decatur, Alabama as aforesaid.

WHEREFORE, the Plaintiff demands judgment herein whereby the Defendant shall be enjoined to remit to the Plaintiff such amounts of taxes as were collected pursuant to §§40-21-80 et. seq., supra, referable to his purchase of electricity as aforesaid.

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BY: JERRY KNIGHT, Attorney
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Serve Defendant as follows:

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Commissioner of Revenue
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IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA

PHILLIP W. KNIGHT,

Plaintiff,

VS. CV-92-288

JAMES M. SIZEMORE, JR.,
as Commissioner of Revenue
for the State of Alabama,

Defendant.

AMENDED COMPLAINT

COMES NOW the Plaintiff in this cause and hereby substitutes this Amended Complaint for the original Complaint heretofore filed in this cause.

Amended Complaint

1. The Plaintiff is an adult, resident citizen of the City of Decatur, Alabama, and brings this action individually and as a class action under Rule 23, Alabama Rules of Civil Procedure, and on behalf of all persons similarly situated, as more particularly described hereinafter.

2. The Defendant James M. Sizemore, Jr., is the Commissioner of Revenue for the State of Alabama and in such capacity is charged by law with the enforcement, administration and collection of various

taxes including those "gross receipts taxes" contemplated by §§40-21-80, et seq., Ala.Code 1975.

3. The Plaintiff is currently purchasing, and has at all times pertinent hereto, electric utility services for his residence from the Utilities Board of the City of Decatur, Alabama. The Utilities Board of the City of Decatur, Alabama, is a franchisee of the Tennessee Valley Authority (hereinafter referred to as TVA), and as such is merely the conduit by which the TVA markets its electricity product within the Decatur area. The Plaintiff is like thousands of other residents of North Alabama in that he, like them, obtain their electrical services from various franchisees of TVA. It is on behalf of those persons, firms, corporations or other entities,.i.e., retail customers of TVA franchisees, that the Plaintiff brings this class action.

4. In his capacity as Commissioner of Revenue for the State of Alabama, the Defendant has imposed and collected the "gross receipts tax" levied by §§40-21-80, et seq., supra, upon the electric utility services provided to the Plaintiff and his class by the various franchisees of TVA. This imposition and collection of the said taxes upon the "gross receipts" of the TVA franchisees, under authority of §§40-21-80, et. seq., supra, and its subsequent collection from the Plaintiff and the members of his class is, and has been, void and illegal in that such gross receipts are expressly exempted from all state, local or municipal taxation by 16 U.S.C. §831.

5. The Plaintiff makes the following specific averments with regard to the maintenance of this

cause as a class action, under Rule 23, Alabama Rules of Civil Procedure:

A. The class is so numerous that joinder of all members is impracticable,

B. There are questions of law or fact common to the class,

C. The claims of the representative party are typical of the claims of the class,

D. The representative party will fairly and adequately protect the interests o.f the class,

E. The prosecution of separate actions by or against individual members of the class would create a risk of

1. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible, standards of conduct for the party opposing the class, or

2. adjudications with respect to individual members of the class which would as a practicable matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests,

F. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

6. There exists a present, viable controversy between the Plaintiff and his class on the one hand, and the Defendant on the other, as to the validity of §40-21-80, et seq., supra, as applied to the Plaintiff's class and the resulting relief to which Plaintiff and his class would be entitled. This controversy is in need of resolution by this Court.

WHEREFORE, the Plaintiff prays that this Court will grant to the Plaintiff and his class the following:

1. A ruling by this Court, as soon as practicable, that this cause may be maintained as a class action under Rule 23, Alabama Rules of Civil Procedure.

2. As Order of this Court construing the provisions of §40-21-80, et seq., Ala.Code 1975 applied to the Plaintiff and his class, and a declaration that §40-21-80, et seq., supra, as it is and has been applied to the Plaintiff and members of his class is void and illegal.

3. An Order permanently enjoining the Defendant, and any of his successors in office, from enforcing §40-21-80, et seq., supra, or any similar provisions of the laws of Alabama against the Plaintiff and members of his class so long as said enforcement violates the laws of the United States of America.

4. An Order compelling the Defendant to refund, with interest, all sums illegally collected from the Plaintiff and his class.

5. Such other, further and different relief which, under the premises, would be appropriate.

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument has been served upon Hon. Wade Hope, Assistant Counsel, Alabama Department of Revenue, Montgomery, AL 36130 and Hon. James H. Evans, Attorney General for the State of Alabama, 11 So. Union Street, Montgomery, AL 36130, by depositing a copy of the same in the United States mail, postage prepaid, directed to their respective

addresses, on this the 14th day of February, 1992.

_____

OF COUNSEL FOR PLAINTIFF

APPENDIX B

ARGUMENT

I. THE CITY OF DECATUR OPERATES UNDER A FRANCHISE OF TVA.

Effective May 18, 1933, Congress established the Tennessee Valley Authority *(see 16 USC 831 et seq.)*. While the Tennessee Valley Authority (hereinafter referred to as "TVA") is a "body corporate", it is clearly established that TVA is an executive agency of the federal government, *Posey v. TVA* 93 F.2d 726 (5th Cir.,1937), and as such has the status of any other federal agency.

While TVA's primary purpose is flood and navigation control, a permissible secondary purpose has been the production and distribution of electric power. *Tennessee Electric Power Co. v. TVA*, 21 F. Supp. 947 (D.C.Tenn., 1938), aff'd 306 US 118, 83 L. Ed. 543, 59 S.Ct. 366. Because of the intergovernmental tax immunity doctrine established in *McCulloch v. Maryland,* 17 US (4 Wheat.) 316, 4 L.Ed. 579 (1819), and in recognition of the fact that TVA should contribute something to local governments in its service area, Congress provided for direct payments by TVA, of a percentage of revenues generated by TVA distribution of electricity. *16 USC 831l.* This payment is identified as an "in lieu of taxation" payment, and the last sentence of the first paragraph of *16 USC 831l* specifically states:

> ... The payments herein authorized are in lieu of taxation,, and the Corporation, its

> property, franchises and income, are hereby expressly exempted from taxation in any manner or form by any state, county, municipality, or any subdivision or district thereof.

Since TVA is an agency of the federal government, its activities were probably exempt from state taxation anyway, but the foregoing provision leaves no doubt that Congress has preempted the field of taxation of the distribution activities of TVA. The intention of Congress to preempt a certain field may be found by express language of the Act or by implication. *Metropolitan Life Ins.Co. v. Potter 533 So.2d 589 (Ala. 1988)*; *Ex Parte Davis, 401 So.2d 52 (Ala.1980)*. Here the Act itself is unequivocal as to the intent of Congress to preclude, or preempt, the field of taxation of TVA activities.

So the question becomes whether the City of Decatur, in the distribution of electric power, operates under a franchise of TVA? The answer to that question has been provided by the Alabama Supreme Court in ***Town of North Courtland v. Town of Courtland***, *597 So.2d 1336 (Ala.1992)*.

In *North Courtland* supra, the town of North Courtland sought to enforce its municipal utility gross receipts tax upon the distribution of electric services by the Town of Courtland within the police jurisdiction of North Courtland. Relying, as the trial court had done, on the decision of *City of Sheffield v. Town of Cherokee, No. 89-AR-5073-NW (N.D. Ala., Oct. 12 1989)*, the Supreme Court held that *16 USC 831l* exempted the operation of the Town of Courtland from the tax. *See 597 So.2d at 1338.* The Federal Court

decision is unpublished, but a copy of that opinion appears at pp. 318–327 of the record in this case. After examining the contractual relationship between Sheffield and TVA, Judge Acker concluded that relationship created a franchise and hence, the operations of Sheffield were exempt under *16 USC 831l.* By adopting Judge Acker's decision in *Sheffield* Justice Hornsby in *North Courtland* reached the same conclusion. If the contract between TVA and the City of Sheffield created a franchise, then clearly the contract between TVA and the City of Decatur, in this case, is a franchise. In fact, the question is beyond dispute or argument since the Defendant in this case has stipulated that the two contracts are identical "in all material respects". (R. 45–46)

II. IN ITS ELECTRIC DISTRIBUTION ACTIVITIES OF THE CITY OF DECATUR FUNCTIONS AS AN INSTRUMENTALITY OF THE FEDERAL GOVERNMENT AND HENCE, ITS ACTIVITIES ARE NOT SUBJECT TO STATE TAXATION.

The contract under which the City of Decatur distributes electric services appears in the record at pp. 49–74. As one can see, this contract gives TVA control of every aspect of Decatur's distribution of electricity. It requires the operation to be non–profit (R.49); it controls the distribution points (R. 50); it establishes the rates to be charged (R.50, 53); the uses to which revenues received by Decatur may be put are strictly controlled (R. 53–54); and in fact, the city is identified as a "distributor" of TVA (R.54). This degree of control by TVA over the activities of Decatur leaves little doubt that, at least under Alabama law, the city is an agent of TVA. *Better v. Aetna Fin.Co., 587 So.2d 308 (Ala.1991.); Bay Shore Properties, Inc. v.*

Drew Corp., 565 So.2d 32 (Ala. 1990); Merrell v.Joe Ballard Oldsmobile, Inc., 529 So.2d 943 (Ala.1988).

In fact, similar arrangements between electric coops and federal agencies have been held to constitute the coop to be an instrumentality or agent of the federal government. *Alabama Power Co. v. Alabama Electric Cooperative Inc., 394 F.2d 672 (5th Cir., 1968); Greensboro Lumber Co. v. Georgia Power, 643 F.Supp. 1345, 1359-60, n. 12 (N.D. Ga., 1986).*

As noted earlier, instrumentalities of the federal government, and their activities

APPENDIX C

16 U.S.C. §831l. Financial assistance to States and local governments in lieu of taxation; apportionment; limitation on contracts for sale of power to municipalities; report to Congress

In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the Corporation: For the fiscal year (beginning July l) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 71/2 per centum; 1944, 7 per centum; 1945, 61/2 per centum; 1946, 6 per –centum; 1947, 5 1/2 per centum ; 1948 and each fiscal year thereafter, 5 per centum. "Gross proceeds", as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States for any purpose other than the resale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises and income, are hereby expressly exempted from taxation in any manner or form by any State, county,

municipality, or any subdivision or district thereof.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payment shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: Provided, That the minimum annual payment to each State (including payments to counties therein) shall not be less than an amount equal to the two-year average of the State and local ad valorem property taxes levied against power property purchased and operated by the Corporation in said State and against that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and held or operated by the Corporation and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated or said land was privately owned: Provided further, That the minimum annual payment to each State in which the Corporation owns and operates power property (including payments to counties therein) shall not be less than $10,000 in any case: Provided further, That

the corporation shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taxing districts within the respective counties) upon power property and reservoir lands allocable to power, determined as above provided, and all payments to any such county within a State shall be deducted from the payment otherwise due to such State under the provisions of this section. The determination of the board of the amounts due hereunder to the respective States and counties shall be final.

The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the

provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits in increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation.

(May 18, 1933, ch 32, § 13, 48 Stat. 66; June 26, 1940, ch 432, § 39, 54 Stat. 626.)

APPENDIX D
§40-21-80, et seq., Ala.Code 1975

PUBLIC UTILITIES
ARTICLE 3.
UTILITY GROSS RECEIPTS TAX.

Cited in Board of Water & Sewer Comm'rs V. Alabama Power Co., 363 So. 2d 304 (Ala. 1978).

§40-21-80. Definitions.

(a) For the purpose of this article, the following terms shall have the respective meanings ascribed by this section:

(1) DEPARTMENT. The Department of Revenue of the State of Alabama.

(2) DOMESTIC WATER. All water except water that is sold to persons for use or consumption in industrial processes and not primarily for human consumption.

(3) GROSS RECEIPTS. The value proceeding or accruing from the furnishing of utility services, all receipts actual and accrued, without any deduction on account of the cost of the utility services sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatever, and without any deductions on account of losses.

(4) GROSS SALES. The value proceeding or accruing from the furnishing of utility services, and including the proceeds from the sale of any utility services handled on consignment by the taxpayer, without any deduction on account of the cost of the utility services sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatever, and without any deductions on

account of losses.

(5) PERSON. An individual, firm, copartnership, association, trust, receiver, corporation, or other entity, and shall specifically include the State of Alabama, every county in the State of Alabama, every municipal corporation in the State of Alabama, the United States of America and its agencies and every public corporation or entity organized under the laws of the United States of America or under the laws of any state of the United States of America and operating in the State of Alabama, as well as every private or nonpublic entity.

(6) RETAIL SALE. All sales except those defined herein as wholesale sales.

(7) TAXPAYER. Any person liable for taxes under the provisions of this article.

(8) UTILITY. Every person regularly engaged in furnishing utility services to another person in the State of Alabama.

(9) UTILITY SERVICES. Electricity, domestic water, natural gas, telegraph services, and telephone services; provided, however, that "utility services" shall not mean electricity, domestic water, natural gas, telephone services, or telegraph services stored, used, or consumed by a utility regularly engaged in furnishing the same such service to the public.

(10) WHOLESALE SALE. A sale or exchange of utility services by a utility to any person or any other utility engaged in the resale of such utility services in the regular course of business.

(11) TELEPHONE SERVICES. Local telephone service ind intrastate toll telephone service, private communications service, teletypewriter, and computer exchange service. The term "telephone services" includes transmission by or through any

media such as wires, cables, microwaves, light waves, or any combination of those or similar media. It includes, but is not limited to, telephone services sold by motels and hotels to their customer, or to others, telephone services sold by colleges and universities to their students or to others, and telephone services sold by hospitals to their patients or to others. The term "telephone services" shall not include:

(i) Telephone services provided through any pay telephone;

(ii) Any excise, franchise, or similar tax or like fee or assessment levied by the United States, by the State of Alabama, or by any political subdivision, upon the purchase, sale, use, or consumption of any telephone services, which tax, fee, or assessment is collected by the seller from the purchaser;

(iii) The furnishing of any telephone services for resale, including access charges paid by an interexchange carrier, provided that any utility making a sale of telephone services for resale shall obtain a certificate from the purchaser of such services certifying that such services are purchased for the purpose of resale, the form of the certification to be determined by rules and regulations to be promulgated by the department;

(iv) Charges for customer premises equipment, including such equipment that is leased or rented by the customer from any source;

(v) Cable television service, paging services, specialized mobile radio, or cellular mobile service; or

(vi) Services which are ancillary to the provision of telephone service but are not directly related to the transmission of voice, data, or information such as directory advertising and installation and repair of equipment and inside wiring.

The term "local telephone service" means the access to a local telephone system, and the privilege of telephonic–quality communication with substantially all persons having telephone stations constituting a part of such local telephone system.

The term "toll telephone service" means (A) a telephonic–quality communication for which there is a toll charge whiell varies in amount according to the distance and elapsed transmission time of each individual communication, or (B) a service that entitles the subscriber or user, upon the payment of a periodic charge that is determined as a flat amount or upon some basis of total elapsed transmission time, or upon some combination thereof, to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located. The term "toll telephone service" includes wide–area telephone service charges.

The term "private communications service" means a communication service that entitles the subscriber or user to exclusive or priority use of a communication channel or group of channels, regardless of whether such channel or group of channels may be connected through switching with a service described in this subparagraph.

The terms "teletypewriter" and "computer exchange service" mean the access from a teletypewriter, telephone, computer, or other dafa station of which such station is a part, and the privilege of intercommunication by such station with substantially

all persons having teletypewriter, telephone, computer, or other data stations constituting a part of the same teletypewriter or computer exchange system. The terms "teletypewriter" and "computer exchange service" do not include the storage of data or information for subsequent retrieval, the retrieval of data or information, or the processing, or reception and processing, of data or information intended to change its form or content.

The term "intrastate," as applied to telephone services, includes only those services originating and terminating wholly in this state.

(b) "Herein," "hereby," "hereunder," "hereof," and other such words of reference shall refer to this article as a whole, and not solely to the particular section or portion of this article in which any such word may be used.

(c) The definitions set forth in this section shall be deemed applicable whether the words defined are used in the singular or the plural.

(Acts 1969, Ex. Sess., No. 21, p. 46, §§ 1, 2; Acts 1969, No. 239, p. 569; Acts 1969, No. 993, p. 1757, § 1; Acts 1976, No. 387, p. 491, § 1: Acts 1992. No. 92-623 p.1466

§ 40-21-81. Legislative intent.

It is the intention of the Legislature of Alabama that the tax herein levied shall **apply** to all utilities, as defined herein, in the State of Alabama. With respect to every tax exemption which may be enacted into law subsequent to the enactment of this article, there shall be a presumption that such exemption does not apply

to the tax herein levied unless the statute containing such exemption shall make a specific reference to this article and shall clearly show a legislative intention to make such exemption applicable to the tax herein levied. (Acts 1969, Ex. Sess., No. 21, p. 46, § 3; Acts 1992, No. 92-623, p. 1466, § 2.)

§ 40-21-82. Levy of tax.

(a) There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege . or license tax against every utility furnishing electricity, domestic water or natural gas in the State of Alabama. The amount of said tax shall be determined by the application of rates against gross sales or gross receipts, as the case may be, from the furnishing of such services in the State of Alabama. The tax shall be computed monthly with respect to each person to whom such services are furnished, in accordance with the following table:

If monthly gross sales or gross receipts respecting a person are:	The tax is:
Not over $40,000	4% of such gross sales or Gross receipts
Over $40,000 but not over $60,000	$1,600 plus 3% of excess over $40,000
Over $60,000	$2,200 plus 2% of excess over $60,000

(b) There is hereby levied a privilege or license tax against every utility furnishing telegraph or telephone services in the State of Alabama. The amount of said tax shall be determined by the application of rates against gross sales or gross receipts, as the case may be, from the furnishing of such services in the State of Alabama. The tax shall be computed monthly with respect to each person to whom such services are furnished, in accordance with the following table:

If monthly gross sales or gross receipts respecting a person are:	The tax is:
Not over $60,000	6.7% of such gross sales or gross receipts
Over $60,000	$4,020 plus 3.7% of excess over $60,000

(Acts 1969, Ex. Sess., No. 21, p. 46, § 4; Acts 1971, 1st Ex. Sess., No. 98, p. 172; Acts 1992, No. 92-623, p. 1466, § 3; Acts 1993, No. 93-614, §2(4).)

§40-21-82.1. Exemptions.

(a) Smith's Water Authority in Lee County,

Alabama, is hereby exempt from all taxes levied under the provisions of Section 40-21-82.

(b) The Northeast Crenshaw Water and Fire Protection Authority in Crenshaw and Montgomery Counties, Alabama, is hereby exempt from all taxes levied under the provisions of Section 40-21-82. (Acts 1978, No. 534, p. 588; Acts 1978, No. 854, p. 1280.)

§40-21-83. Exclusions.

There are hereby specifically excluded from the gross receipts or gross sales of a utility, all revenues derived from the following:

(1) The furnishing of utility services which the State of Alabama is prohibited from taxing under the Constitution or laws of the United States of America or the Constitution of the State of Alabama;

(2) The furnishing of utility services which are otherwise taxed under the provisions of Sections 40-23-1 through 40-23-36 or the Alabama Transaction Tax Act of 1992, if enacted into law;

(3) Wholesale sales;

(4) The furnishing of electricity, natural gas, or domestic water for use or consumption by any person in or for the direct production, generation, processing, storage, delivery, or transmission of electricity, natural gas, or domestic water;

(5) The furnishing of electricity to a manufacturer or compounder for use in an electrolytic or electrothermal manufacturing or compounding process;

(6) The furnishing of natural gas to a manufacturer or compounder as a chemical raw material in the manufacturing or compounding of tangible personal property, but not as fuel or energy;

(7) The furnishing of natural gas to be used

by a manufacturer or compounder to chemically convert raw materials prior to the use of such converted raw materials in an electrolytic or electrothermal manufacturing or compounding process; and

(8) The use or consumption of electricity by an incorporated municipality or a board or corporation organized under the authority of any incorporated municipality in furnishing or providing street lighting or traffic-control systems, the use or consumption of telephone services by an incorporated municipality in providing fire alarm systems, and the use or consumption of domestic, water by an incorporated municipality in extinguishing fires, explosions, or conflagrations.

(Acts 1969, Ex. Sess., No. 21, p. 46, § 5; Acts 1969, No. 993, p. 1757; Acts 1975, No. 1198, p. 2374, §1; Acts 1976, No. 387, p. 491, §2; Acts 1992, No. 92-623, p. 1466, § 4.)

§ 40-21-84. Utility license required.

Any person regularly engaging in any business for which a privilege tax is imposed by Section 40-21-82 shall apply for and obtain from the department a license to engage in and to conduct the business of furnishing utility services r. Such license shall be granted upon the condition for the then current tax year that the applicant must pay all taxes accruing to the State of Alabama under the provisions of this article; provided, however, that no such license shall be issued to any person who has not complied with the provisions of this article. No provision of this article shall be construed as relieving any person from the payment of any license or privilege tax now or hereafter imposed by law. (Acts 1969, Ex. Sess., No.

21, p. 46, §6; Acts 1992, No. 92-623, p. 1466, §5.)

§ 40-21-85. Administration of article and collection of tax.

(a) The provisions of this article shall be administered and the tax herein levied shall be collected in accordance with the uniform procedures set forth in this title, along with the procedures set forth in Division 1 of Article 1 of Chapter 23 of this title, for administering and collecting the tax therein levied, and for such purposes there are hereby incorporated into this article by reference the provisions of Sections 40-23-8 through 40-23-12, 40-23-25 and 40-23-27 through 40-23-31, together with the definitions applicable to said sections contained in Section 40-23-1; provided, that in the event of the repeal of such division, such repeal shall not operate to eliminate the tax collection procedures contained therein to the extent they are incorporated in this article by reference, unless the legislation providing for such repeal shall clearly indicate such a result.

The taxes herein levied shall be due and payable as follows:

(1) Any taxpayer liable for taxes under the provisions of this subdivision whose average monthly tax liability was less than $10,000 during the preceding calendar year shall remit such taxes in accordance with Section 40-23-7.

(2) Any taxpayer liable for taxes under the provisions of this subdivision whose average monthly tax liability was $10,000 or greater during the preceding calendar year shall make estimated payments to the Revenue Department on or before the twentieth day of the month in which the liability occurred.

(b) The amounts of the payment shall be at least equal to the taxpayer's actual tax liability for the same calendar month of the preceding year.

(c) Any outstanding credit or deficit arising from the taxpayer's overpayment or underpayment of its final liability shall be applied to either increase or reduce, as the case may be, that month's final tax liability which shall be reported-and paid not later than the twentieth of the month next succeeding the month in which the tax accrues. The provisions of Section 40-23-7 shall apply to the filing of the monthly tax liability report,

(d) In those instances where a taxpayer due to divestiture compliance with a lawful order of a court of competent jurisdiction, or the sale of a portion of the business on which said tax is applicable, where such divestiture compliance or sale reduces the gross revenues of the taxpayer, the Commissioner of Revenue shall determine for a period of 12 months following such divestiture compliance or sale the monthly estimated tax liability and shall consider among others, the financial historical data and the percentage of divestiture or sale of said business of the taxpayer. Following the 12-month period, taxes shall be remitted in accordance with subsection (c) of this section.

(e) In those instances where there is no preceding calendar year for purposes of determining the tax liability of any taxpayer, the Commissioner of Revenue shall determine for a period of 12 months the monthly estimated tax liability for the taxpayer. Following the 12-month period, taxes shall be remitted in accordance with subsection (c) of this section.

(Acts 1969, Ex. Sess., No. 21, p. 46, §7; Acts 1983, No. 83-739, p. 1207; Acts 1992, No. 92-186, p.349,

§63.)

§ 40-21-86. Responsibilities of utilities.

Every person engaged in the State of Alabama in the furnishing of utility services shall add to the price or charge for such utility services to every purchaser thereof an amount equal to the prescribed percentage of the gross price or gross charge therefor and shall collect said amount from every purchaser of such utility services. It shall be unlawful for any person fumishing utility services to fail or refuse to collect from the purchaser the amount required by this section to be collected, and it shall likewise be unlawful to refund or offer to refund all or any part of the amount collected or to absorb or advertise directly or indirectly the absorption or refund of said amount or any portion thereof. The provisions of this section that the tax herein levied shall be collected from the purchaser shall in no way relieve anyutility of the tax herein levied; nor shall the inability, impracticability, refusal, or failure so to collect from such purchaser the amounts provided herein relieve such utility of the tax herein levied. All taxes paid in pursuance of this article shall be conclusively presumed to be a direct tax on the purchaser precollected for the purpose of convenience and facility only. (Acts 1969, Ex. Sess., No. 21, p. 46, § 7A; Acts 1992, No. 92-623, p. 1466, § 6.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

CITY OF SHEFFIELD,
ALABAMA,
Plaintiff,

vs. CIVIL ACTION NO.
TOWN OF CHEROKEE, 89-AR-5073-NW
ALABAMA,
Defendant.

MEMORANDUM OPINION

The court has for consideration cross-motions for summary judgment filed by the plaintiff, City of Sheffield, Alabama (Sheffield) and by the defendant, Town of Cherokee, Alabama (Cherokee). Both parties concede that the case can be decided under Rule 56, F.R.Civ.P.

Pertinent Undisputed Facts

The parties are municipal corporations and are located in Colbert County, Alabama. On March 15, 1976, Sheffield entered into a power distribution contract with the Tennessee Valley Authority (TVA). Federal law gives TVA the authority to enter into such contracts with municipalities. Pursuant to the contract, Sheffield buys electricity from TVA at a wholesale rate and resells the electricity at a rate established by TVA. Sheffield is not allowed under the contract to profit

from the resale of the electricity. In other words, the contract between TVA and Sheffield explicitly provides that Sheffield cannot operate its electricity distribution system (herein "operation") in such a way as to raise revenue for the general benefit of Sheffield.

While the contract does not allow Sheffield to profit from the operation, Sheffield may retain certain funds received "in lieu of taxes." The funds from the electrical distribution operation are to be kept separate from other Sheffield funds. With one very relevant exception, the contract provides that Sheffield may not use the gross revenue of the operation except to cover operating expenses, to make payments on operation related interest and principal payments, and to retain working capital for contingencies and a reasonable number of weeks. All of the aforementioned options for using operation revenue refer to use of the revenue for purposes related to the operation. If Sheffield still has revenue from the operation after amounts have been allocated to purposes related to the operation, it may transfer a "tax equivalent payment" into its general fund. All revenue remaining in the operation's account after the "tax equivalent payment" has been made is surplus and may require wholesale rate reductions to deplete the surplus.

The tax equivalent payments are defined in an addendum to the TVA–Sheffield contract entitled "Schedule of Terms and Conditions". As a result of operating an electric distribution system for TVA, and if funds remain in the operation's account, Sheffield "may take each year from the electric system, in lieu of taxes, an amount representing the fair share of the cost of government properly to be borne that year by

its electric system, not to exceed a maximum amount ... calculated by applying the prevailing municipal, county and State property tax rates to the depreciated original cost of tangible property used in electric operations within the respective taxing jurisdictions at the beginning of each tax year." In other words, the amount taxable on operation property by Alabama, Colbert County, Sheffield and any other municipality in which operation property is situated limits Sheffield's tax equivalent payment. By accepting tax equivalent payments, Sheffield gives up the right to impose taxes "upon the property or operations of its electric system, or upon the sale, purchase, use or consumption of electric energy supplied thereby." Moreover, "[i]t shall be the responsibility of [Sheffield] to provide for such distribution as may be required by law or as it deems appropriate under the provisions of Section 13 of the TVA Act to the state, counties and any other municipal corporations in which it operates of any tax equivalents so collected by [Sheffield] in lieu of State, county and other municipal taxes."

Sheffield sells TVA-supplied electricity to areas in Colbert County that are not within its municipal jurisdiction. Cherokee is one area in which Sheffield sells this electricity. In 1973, Cherokee off icials passed an ordinance, levying a privilege or license tax on entities "engaged in the business of operating power companies or other public utilities" of three percent (3%) of gross receipts on business done in Cherokee and of one and one half percent (1.5%) of gross receipts on business done in Cherokee's police jurisdiction. The tax lay dormant for fifteen years. In September 1988, Cherokee filed an action in state court against Sheffield for $100,000.00 allegedly due because of the 1973 tax. Sheffield filed this action,

seeking a declaration that both federal and state law disallow the tax which Cherokee asserts in the state court action and seeking an injunction against Cherokee's collection from Sheffield of the tax.

Conclusions of Law

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), provides the standard by which this court measures a motion for summary judgment. The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.*, 106 S.Ct. at 2553. Then, the opposing party must go beyond the pleadings to demonstrate that the record contains a material fact in dispute. *Id.* Because each party filed a summary judgment motion, each bears identical burdens. Each party agrees that the facts are not disputed and that this cause turns upon a pure question of law, namely, whether a municipality may levy a tax against another municipal corporation which operates an electric operation on a non-profit basis pursuant to the TVA Act.

Before looking into the merits, the court severely scrutinized its jurisdiction over the cause. The Declaratory Judgment Act, 28 U.S.C. § 2201, does not extend the jurisdiction of federal courts but merely provides another federal remedy. *Franchise Tax Bd. v. Const. Laborers Vac. Trust,* 463 U.S. 1, 103 S.Ct. 2840 (1983). However, Sheffield squarely confronts the court with a question "arising under" federal law.

Sheffield asks the court to determine, in addition to a claim based on state law, whether 16 U.S.C. § 831l bars the tax that Cherokee seeks to impose on Sheffield. Consequently, the court has jurisdiction based on 28 U.S.C. § 1331.

The instant case is very similar to *City of Tullahoma v. Coffee County, Tennessee,* 328 F.2d 683 (6th Cir. 1964). *City of Tullahoma* was a declaratory judgment action filed by a city that obtained electric power from TVA under contract, seeking a declaration of its rights under the contract Concerning the distribution of "in lieu of taxes" payments into the city's general fund. Coffee County sought the amount that Tullahoma retained based on "an amount calculated by applying the county property tax rate to the depreciated cost of tangible–property used in electric operations." Id. at 685. The Sixth Circuit examined the legi.slative history of the TVA Act in general, and the section at issue here in particular, and determined that federal law does not mandate nor determine the rights to distribution of tax equivalent payments. Id. at 687. Congress, according to the Sixth Circuit, felt that, as a matter of federalism, it could not legislate the distribution of the tax equivalent payments, but, as Senator Norris noted, "the States could provide by statute that when any municipality received anything in lieu of taxation, it should be subdivided just the same as though it was (sic) taxes ... Id. at 689 (citing Hearing on S. 2925 Before a Subcommittee of the Senate Committee on Agriculture and Forestry, Cong., 3d Sess. 33 (1940)) . The Sixth Circuit concluded that the TVA Act did not authorize the district court's declaration that Tullahoma must pay a portion of the tax equivalent payments to the county. Id. at 687. Rather, the matter was a state concern to be

addressed by state legislation.

While the instant case is similar to *City of Tullahoma,* the cases are not identical. Cherokee, rather than demanding its portion, if any, of the tax equivalent payments that TVA made to Sheffield's general fund, imposed a tax on Sheffield's distribution, of electricity within Cherokee's jurisdiction. Unlike in *City of* Tullahoma where the TVA Act did not provide a rule regarding distribution of tax equivalent payments, the Act does provide an answer here. The TVA Act, 16 U.S.C. § 831l, provides for a second type of "in lieu of tax" payments made by TVA to state and local governments, but that provision, as noted in *City of Tullahoma,* does not affect TVA's power to provide "in lieu of tax" payments in its electricity distribution contracts. More importantly, the payments authorized in § 831l are "in lieu of tax". In other words, "[TVA], its property, franchises and income, are expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof." 16 U.S.C. § 831l (1940). Because TVA makes these tax equivalent payments to governments in whose jurisdiction TVA carries on its power operations, certain aspects of the TVA operation are exempt from state and local taxation.

The validity of Cherokee's tax, then, would appear to depend upon whether the contract between TVA and Sheffield constitutes a "franchise" for purposes of § 831l. The matter is far from clear. The contract itself nowhere mentions a franchise. Nor does the TVA Act define the term "franchise". However, based on long standing usage of the term and the purpose of the TVA Act, the court finds that Sheffield received a franchise from TVA and that revenue from that

franchise is exempt from Cherokee's tax. Long before the term became used in distributorship relationships, a "franchise" was known as a special privilege conferred upon individuals or corporations by governmental authority to do something that could not be done of common right. *Bank of Augusta v. Earle,* 38 U.S. 519 (1838). Here, TVA, an agency of the United States (See 16 U.S.C. § 831 et seq.), conferred upon Sheffield the ability to receive TVA's excess electricity at a wholesale rate and to distribute it to the benefit of consumers.

The purpose of the TVA Act and its provision of tax equivalent payments supports the decision that proceeds of the TVA–Sheffield contract are exempt from Cherokee's tax. Congress intended TVA to distribute power to consumers at the lowest possible cost to the consumer. See 16 U.S.C. § 831i (1935) (expressing a Congressional preference for distribution of excess electricity to organizations not engaged in distribution for profit) TVA includes the tax equivalent payments in its electricity distribution contracts to prevent higher charges for electricity because of municipal taxes; in order to receive the payments, Sheffield cannot tax the sale of the electricity. To allow Cherokee to tax the sale of the TVA supplied power would thwart Congress' purpose in allowing TVA to sell its excess electricity to municipalities and in providing consumers with economical sources of power. Moreover, Cherokee's tax is unrelated to the tax equivalent payment Sheffield receives from TVA. Other municipalities and Colbert County could enact similar taxes and, if the taxes are burdensome, effectively tax the operation out of business, leaving Colbert County without an economical source of electricity.

The basic dispute presented is one not resolved by the law applicable to the complaint. Basically, Cherokee wants to receive a portion of the tax equivalent payments made by TVA to Sheffield. The TVA Act, however, prevents the imposition of a tax "in any manner" upon the operation that Cherokee seeks to tax. Therefore, the method chosen by Cherokee to recover a portion of the payments is invalid. Because Sheffield is contractually bound to operate its facility at a zero profit margin, hence not making revenue, the conclusion that Cherokee may not tax Sheffield's electric operation would be the same under Alabama law. Nothing in this opinion, however, should be construed as an opinion of the court on whether Sheffield may be forced to distribute the tax equivalent payments it receives directly from TVA by some method other than taxation.

For the foregoing reasons, summary judgment in favor of Sheffield and against Cherokee is due to be granted.

An appropriate, separate order will be entered.

DONE this 12th day of October, 1989.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX F

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA

PHILLIP W. KNIGHT,

Plaintiff,

VS.

CASE NO. CV-92-288

GEORGE MINGLEDORFF, Etc.,

Defendant.

ORDER

Phillip W. Knight filed this action against James M. Sizemore, Jr., Etc., as Commissioner of Revenue for the State of Alabama (see NOTE below), seeking a refund of utility gross receipts tax, a declaratory judgment and injunctive relief. The Commissioner filed a motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Having considered the stipulation of facts, exhibits, numerous briefs filed by the parties, and the applicable law, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Plaintiff, Mr. Knight, is a resident of the City of Decatur, Alabama and is a retail purchaser of electricity from the City of Decatur Utility Board. The City of Decatur Utility Board distributes electricity pursuant to a contract with the Tennessee Valley Authority (hereinafter referred to as TVA). The State

Department of Revenue has received payment of the utility gross receipts tax pursuant to Code of Alabama, §40-21-80, et seq., (1975) from the City of Decatur Utilities Board (hereinafter referred to as "City of Decatur"). The City of Decatur collected the utility gross receipts tax from Mr. Knight and other retail purchasers of electricity provided by the City of Decatur.

CONCLUSIONS OF LAW

Pursuant to the statutory provisions before this Court, each utility provider is required to add the amount of the tax to the price or charge for the utility service and collect the tax from its customers. Section 40-21-86. The tax levied is designated as a privilege or license tax levied against utilities on account of the furnishing of utility service by the utility and collected pursuant to §40-21-85 and §40-21-86. Section 40-21-86 expressly provides that "all taxes paid in pursuant to this article shall be conclusively presumed to be a direct tax on the purchaser precollected for the purpose of convenience and facility only." The Alabama Supreme Court has reaffirmed this principle several times, stating that the utility gross receipts tax is a direct tax levied on the consumer and not the utility. See City of Birmingham v. Alabama Gas Corp., 564 So.2d 416, 417 (Ala. 1990); Ex parte White, 477 So.2d 422, 423-24 fn.2 (Ala. 1985).

Mr. Knight contends that 16 U.S.C. §831l preempts the State from imposing any kind of tax on electricity generated by TVA. He argues that his purchase of electricity from the City of Decatur is excluded from the "gross receipts" of the City of Decatur pursuant to §40-

18-83(1), and thereby excluded from the levy of the utility gross receipts tax. I disagree.

The language of the statutes make it clear that the intent of the Legislature was to impose the utility gross receipts tax on the customers of all utilities in this State. City of Birmingham v. Alabama Gas Corp., supra. The Court cannot find that the Legislature intended that Mr. Knight be the beneficiary of the exemption in §40-21-83(1). Section 40-21-83(1), provides for "exclusions" from tax, which the Alabama Supreme Court in Ex parte White, supra, characterized as *exempting* certain uses of electricity from tax. The exclusion (or exemption) provided in §40-21-83(1) excludes utility services that are provided to the federal government. Department of Revenue Utility Tax Rule No. 1, Rule No. 810-6-5-.26, provides in §(7)(d) that the tax levied under the utility gross receipts statute does not not apply to utility services furnished to the Federal Government and its agencies. When tax statutes have been construed by the highest officials charged with the duty of administering the tax law, such construction should be given favorable consideration by the courts, especially if such consideration has stood unchallenged for a considerable period of time. State v. Reid, 284 Ala. 191, 223 So.2d 594 (1969). Accordingly, the construction given the statute by the Department of Revenue is due to be given strong consideration.

In addition, the universal rule of construction is that exemptions from taxation, whether statutory or constitutional, are to be strictly construed against the exemption and in favor of the right to tax. No person or property is to be exempted unless the intention to exempt such person or property clearly appears in

some statute or constitutional provision. Brundidge Milling Co. v. State, 45 Ala.App. 208, 228 So.2d 475 (1969).

The furnishing of utility services is not excluded from the computation of the tax because it involves electricity purchased from TVA. The furnishing of electricity is excluded only if the electricity is furnished to an entity of the federal government. The exclusion from the utility gross receipts tax does not depend upon the source of the electricity, but rather on how the electricity is to be used and by whom.

While the Commissioner has argued that the Constitution of Alabama 1901, §14 prohibits a suit against the State, including a State official, there is no prohibition in seeking, declaratory and injunctive relief. This Court certainly has jurisdiction f or the purpose of declaring the rights of persons affected by the application of the utility gross receipts tax statutes to them. Accordingly, it is not necessary for this Court to make a determination of whether Mr. Knight must file a petition for refund with the Department of Revenue as a statutory prerequisite to obtaining a refund of tax from the State. Since it is determined that Mr. Knight is not entitled to any relief as claimed, it is not necessary to address other issues raised by the Commissioner.

It is therefore ORDERED, ADJUDGED AND DECREED that this action be dismissed with each party to bear its own costs.

DONE this the 18th day of June, 1993.

/s/JOSEPH PHELPS,
Circuit Judge

APPENDIX G

STATE OF ALABAMA --- JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 1993-94

AV92000658

Phillip W. Knight v. George Mingledorff, Commissioner of Revenue, State of Alabama, Appeal from Montgomery Circuit Court (CV-92-288)

PER CURIAM

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Alabama Rules of Appellate Procedure.

All the Judges concur.

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

CV 92-288
RE: AV92000658.00 March 25, 1994

PHILLIP KNIGHT	GEORGE MINGLEDORFF, COMMISSIONER
VS.	OF REVENUE, STATE OF ALABAMA
Appellant	Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

Court Reporter granted additional time to file reporter's transcript to and including

Clerk/Register granted additional time to file clerk's record/record on appeal to and including

Appell_ granted 7 additional days to file brief(s) to and including

Appellant(s) granted 7 additional days to file reply brief(s) to and including

Record on Appeal filed on this date.

Submitted on Briefs

XX Application for rehearing overruled. No opinion written on rehearing.

Permission to file amicus curias briefs granted

Rules suspended

Transferred to the Supreme Court for lack of jurisdiction. A/N

IN THE SUPREME COURT OF ALABAMA

June 24, 1994

1930938

Ex parte Phillip W. Knight. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEMS (In re: Phillip w. Knight v. George W. Mingledorff, Ccmissioner of Revenue, State of Alabama) (AV92000658) (Montgomery: CV-92-288)

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

Ingram, J. – Hornsby, CJ., Maddox, Shores and Steagall, JJ., concur.